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IN THE

Supreme Court of the United States

No. 73-1251

CHARLES FELTON, Warden, Illinois State Penitentiary, Joliet Branch,

Petitioner,

vs.

SAMUEL SAIKEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals For The Seventh Circuit affirming the issuance of a writ of habeas corpus in this case *sub nom. United States ex rel. Saiken* v. *Bensinger and Twomey*[1] (No. 72-2049) (a copy

1. Petitioner Charles Felton has succeeded John J. Twomey as Warden of the Illinois State Penitentiary, Joliet Branch. Peter B. Bensinger is the former Director of the Illinois Department of Corrections.

of which is attached hereto as Petitioner's Appendix A) is unreported as yet. The decision of the United States District Court for the Northern District of Illinois granting the writ of habeas corpus is reported *sub nom. Saiken v. Elrod,* 350 F. Supp. 1156 (N.D. Ill. 1972) (a copy of which is attached hereto as Petitioner's Appendix B).

JURISDICTION

The instant Petition For Writ Of Certiorari is filed pursuant to Title 28 U.S.C. § 1254 (1) and seeks review of the judgment of the United States Court of Appeals For The Seventh Circuit entered in this Case on November 16, 1973. No Petition For Rehearing was filed with the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the remedy of federal habeas corpus should be available to state prisoners seeking to exclude evidence resulting from an allegedly unlawful search and seizure where the merits of the alleged constitutional violation have been raised and fully litigated in the state courts?

2. Whether a search warrant based upon an affidavit containing hearsay information is valid where the affidavit gives the true name of the informant and the information recited is sufficiently detailed as to indicate that the informer has specific knowledge of the matters asserted?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented by this case involve the fourth amendment to the federal constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized."

and Title 28 U.S.C. § 2254(a):

"The Supreme Court, a Justice thereof, a circut judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

On February 20, 1969, Police Officer Harry Young discovered the dead body of seventeen year old Ella Jean Scott buried beneath a pile of manure located behind the goose barn on Samuel Saiken's farm in Chesterton, Indiana. The victim, who had been a friend both of Samuel Saiken and of his son, Joel Saiken, had died as a result of a gunshot wound.

Samuel Saiken was indicted and tried in the Circuit Court of Cook County, Illinois for the offenses of murder and for conspiring with his son, Joel, to obstruct justice by concealing the victim's body in a steel drum and burying it on his Chesterton, Indiana farm. The relevant evidence introduced at trial may be briefly summarized.

Samuel Saiken testified in his own behalf. He stated that he had met the victim at O'Hare Airport in Chicago on November 4, 1967 and had driven her to his farm in Indiana, where they picked up his son, Joel, and together with the victim's cat, drove back to Chicago to Samuel Saiken's warehouse. Upon arriving at the warehouse, Saiken testi-

fied that the victim and his son Joel went into the warehouse, and that his son returned alone to the car about five minutes later. Saiken stated that a short time later, his son admitted killing Ella Scott. Saiken denied the charge of obstructing justice.

Joel Saiken testified that he had been at his father's Indiana farm on November 4 and 5 and had never seen the victim alive during that period. He testified that his father had gone to the airport to meet the victim, returned alone to the farm and admitted killing the victim. Thereupon, father and son returned to the Chicago warehouse and placed the victim's body in a steel drum. In response to a request from his father, Joel Saiken then buried the body beneath a manure pile behind the goose barn on his father's farm.

A jury found Samuel Saiken guilty of obstruction of justice and the court sentenced Saiken to two to three years imprisonment in the state penitentiary.

Prior to trial, Saiken filed a motion to suppress the victim's body on the ground that the body was recovered in violation of his fourth amendment protection against unreasonable searches and seizures. Specifically, Saiken contended that the affidavit in support of the search warrant for the body was insufficient in that it was based on hearsay.

The affidavit of Police Officer Harry Young on which the warrant was issued, provides in relevant part:

> "Harry Young swears that by virtue of information voluntarily conveyed to him by one Joel Saiken on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit: a white, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:

> The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less,
>
> said real estate being the property of Sam D. and Minnie Saiken, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.
>
> "Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified as Burns Indiana Statutes 9-607, that the Honorable Judge of this Court, taking with him such constables and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said Judge."

At the hearing on the motion to suppress, Officer Young testified that during his one and one-half hour conversation with Joel Saiken on February 18, 1969, Joel had told him that the victim had died from a gunshot wound and that he had buried her body on his father's farm — beneath a manure pile behind the goose barn.

Based on this information, the officer obtained a search warrant on February 19, 1969 and proceeded to respondent's farm, where he began his search by digging near the goose barn. The ground was frozen and, after about two hours, being unable to find the body he left. That evening he again spoke with Joel Saiken concerning the exact location of the body. The next day, Officer Young returned to the spot where he had been digging the day before and continued to dig. After about four hours, he found the body.

The trial court denied the motion to suppress. Following conviction, respondent appealed to the Supreme Court

of Illinois, alleging as one ground for reversal, the erroneous denial of his motion to suppress the victim's body as the result of an improper search. The Supreme Court of Illinois found that the search warrant was properly issued upon the affidavit of Officer Young and affirmed respondent's conviction. *People* v. *Saiken,* 49 Ill. 2d 504, 275 N.E. 2d 381 (1971) and denied his Petition for Rehearing. This Court denied the subsequent petition for writ of certiorari to the Supreme Court of Illinois. *Saiken* v. *Illinois,* 405 U.S. 1066 (1972).

Respondent herein then filed a petition for habeas corpus relief in the federal district court on the ground that "the evidence by which he was convicted was obtained by a search warrant issued in violation of his rights under the Fourth Amendment to the United States Constitution." *United States ex rel. Saiken* v. *Elrod,* 350 F. Supp. 1156, 1157 (N.D. Ill. 1972). Finding that Saiken had exhausted his available state remedies, the district court issued the writ, stating:

> ". . . it is clear that the Justice of the Peace was not afforded reasonable grounds for issuing the warrant. There is nothing on the face of the warrant to show the credibility of the informant, 'one Joel Saiken', and insufficient basis on the face of the warrant to ascertain that the information contained therein is reliable and not merely speculative. There is a similarity of last names and apparent intimacy with the facts, but for all that appears in the document, its contents could be pure fantasy."

(350 F. Supp. at 1158). Subsequently, the State filed Motions to Vacate the order granting the writ or to Stay the Mandate. In the Motion to Vacate, the petitioner herein argued the sufficiency of the warrant as well as the impropriety of entertaining the fourth amendment issue in a collateral attack in the federal court upon a state court

judgment of conviction.[2] The Motion To Vacate was denied and petitioner appealed.

The Court of Appeals concluded that the District Court had correctly determined that the affidavit was an insufficient foundation for the warrant but vacated the judgment granting the writ of habeas corpus and remanded the case for further proceedings to determine whether the search and seizure occurred beyond the curtilage of the Saiken residence, i.e., in the open fields.

Petitioner herein seeks a writ of certiorari to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE PETITION

I.

CLAIMED VIOLATIONS OF THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES SHOULD BE EXCLUDED FROM CONSIDERATION IN FEDERAL HABEAS CORPUS PROCEEDINGS INSTITUTED BY STATE PRISONERS, ESPECIALLY WHERE, AS HERE, THE MERITS OF THE ALLEGED CONSTITUTIONAL INFRINGEMENT HAVE BEEN FULLY ADJUDICATED IN THE STATE COURTS.

This case exemplifies with gruesome clarity the absurd and unnecessary price that our society is being forced to pay for the unchecked expansion of the federal habeas corpus remedy beyond its proper bounds. Judge Sprecher noted in dissent from the opinion of the Court of Appeals that this case fulfills the dire prophesy of Mr. Justice

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2. This argument was again raised by petitioner in the Court of Appeals. See Brief and Argument for Respondents-Appellants, Point III, p. 14-15.

(then Judge) Cardozo: the dead body of a murdered seventeen year old girl is to be suppressed because, according to the Court of Appeals, the police officer blundered—not in the sense of a flagrant abuse of constitutionally protected rights, but technically blundered by securing a search warrant, which the court, with the benefit of dispassionate and detached reflection now finds to be supported by an insufficient affidavit.[3] In reality, this case transcends the Cardozo prophesy since the order of suppression herein comes not prior to or at trial or even on appeal, but rather follows the full litigation and rejection of respondent's claim in the state courts and follows, too, his conviction, sentence and incarceration. To allow this relitigation of fourth amendment claims by state prisoners after the same issues have been fully adjudicated by the state courts violates the historical purposes of the writ of habeas corpus and does violence to the administration of the criminal justice system.

The history of the writ of habeas corpus at common law and as interpreted by this Court prior to the decision in *Brown* v. *Allen,* 344 U.S. 443 (1963) indicates that only those questions relating to the jurisdiction of the trial court to act were properly before the federal courts on habeas corpus. *Andrews* v. *Swartz,* 156 U.S. 272 (1895); *In Re Moran,* 203 U.S. 96 (1906). The only exception to this rule was the recognized availability of the writ in those cases in which the state court procedures were ineffective to fairly determine the constitutional claim being presented. *Frank* v. *Mangum,* 237 U.S. 309 (1915). However, with this Court's decision in *Brown* v. *Allen, supra,* the federal ha-

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3. In truth, if one accepts the premise of the Court of Appeals that the affidavit is insufficient, it is not the police officer who blundered, but rather, the magistrate who issued the search warrant based upon that affidavit.

beas corpus remedy has expanded to the point where a wide variety of constitutional contentions are now litigated in federal court following a full and fair determination of the merits of the identical issues by the state courts. In effect, a federal court on habeas corpus now sits as a court of review over the state courts, and performs what is normally an appellate function. Not only is this result the product of an unexplained, unauthorized and unwarranted judicial expansion of federal statutory authority, it effectively undermines the very integrity of the state determination, debilitates the authority of the state judiciary, and introduces a total lack of finality to state criminal convictions.[4] See *Schneckloth* v. *Bustamonte*, ——U.S.——, 93 S. Ct. 2059 (1973) (Concurring opinion of Mr. Justice Powell).

This result is most inappropriate in cases in which the claimed constitutional violation arises under the fourth amendment. Issues concerning the reasonableness of searches and seizures are among the most difficult in the law and are highly subject to inconsistent resolution. Once resolved, the consequence of a fourth amendment violation is the total exclusion of evidence produced by the search, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), despite the fact that an illegal seizure has no effect upon the trustworthiness of the evidence seized. Indeed, such evidence often conclusively establishes a defendant's guilt.

While the stated purpose of the exclusionary rule is to deter illegal police conduct, *Linkletter* v. *Walker*, 381 U.S. 618 (1965), it does not follow, as this Court recently noted,

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4. For example, the constitutional issue raised by respondent in his habeas petition and adjudicated by the federal district judge is the identical issue which was raised and fully determined by a state trial judge and by several state appellate judges (unanimously) and on which relief was denied by this Court.

"that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *United States* v. *Calandra*, ——U.S.——, 14 Crim. L. Rptr. 3061, 3065 (January 8, 1974). The efficacy of the rule in accomplishing its stated objective in the context of a criminal trial is highly questionable. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Mr. Chief Justice Burger, dissenting); Oaks, "Studying the Exclusionary Rule in Search and Seizure", 37 U. Chi. L. Rev. 665 (1970). Whatever its prophylactic value at trial, that value is greatly diminished or completely extinguished when an exclusionary rule issue is litigated in a collateral proceeding years after trial. As Mr. Justice Powell noted in his concurring opinion in *Schneckloth, supra*, "It makes little sense to extend the *Mapp* exclusionary rule to a federal habeas proceeding where its asserted deterrent effect must be least efficacious, and its obvious harmful consequences persist in full force".

The decision of the court below in the instant case suppressing a murdered body seized pursuant to a search warrant the validity of which was fully and fairly determined by the state courts reflects the ultimate absurdity wrought by permitting claimed exclusionary rule violations to be relitigated in collateral federal proceedings. This Court should grant certiorari in this case and limit the availability of federal habeas corpus relief by eliminating from consideration all claimed exclusionary rule violations which have been fully and fairly litigated in the state courts.

II.

A SEARCH WARRANT BASED UPON AN AFFIDAVIT CONTAINING HEARSAY INFORMATION IS VALID WHERE THE AFFIDAVIT GIVES THE TRUE NAME OF THE INFORMANT AND THE INFORMATION RECITED IS SUFFICIENTLY DETAILED AS TO INDICATE THAT THE INFORMER HAS SPECIFIC KNOWLEDGE OF THE MATTERS ASSERTED.

The Court of Appeals found that the affidavit in support of the search warrant herein was defective in that it failed to contain a recitation of the underlying circumstances from which the affiant concluded that the informer was reliable and credible. This finding is based upon a hypertechnical rather than a common sense reading of the affidavit and discourages rather than encourages the use of the warrant procedure as a means of effectuating a search.

This Court has repeatedly stated that any evaluation of the constitutionality of a search warrant must begin with a recognition of the preference to be given to the "informed and deliberate determinations of magistrates empowered to issue warrants" over the spontaneous decision of a police officer in determining the existence of probable cause. *United States* v. *Ventresca,* 380 U.S. 102 (1965); *Beck* v. *Ohio,* 379 U.S. 89 (1969); *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Jones* v. *United States,* 362 U.S. 257 (1960). Where, as here, the police officer has secured a warrant prior to conducting the desired search, the sufficiency of the supporting affidavit "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion". *United States* v. *Ventresca, supra,* at 108.

In the present case, the affidavit in support of the search warrant reads:

> "Harry Young swears that by virtue of information voluntarily conveyed to him by one Joel Saiken on

> Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit: a white, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:
>
> [Legal Description]
>
> said real estate being the property of Sam D. and Minnie Saiken, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed."

Such an affidavit, based upon hearsay information, is sufficient basis for the issunce of a valid warrant when the magistrate is informed of some of the underlying circumstances from which the informant, who need not be named, concluded that the property to be seized was situated at the location claimed and second, some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. *Aguilar* v. *Texas, supra.*

The Court of Appeals agreed that the affidavit herein meets the first requirement of *Aguilar* since the degree of specificity of the informer's representations indicates "that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation". *Spinelli* v. *United States,* 393 U.S. 410, 416 (1969). However, the court concluded that the second requirement of *Aguilar* had not been met because there was no information contained in the affidavit to indicate the reliability or credibility of the informant. This conclusion ignores three factors.

First, the informer is identified in the affidavit by his true name, Joel Saiken. The requirement of establishing

reliability does not apply to a non-professional informant such as a victim, citizen or eyewitness to a crime. See *United States* v. *Harris*, 403 U.S. 573 (1971); *United States* v. *Unger*, 469 F. 2d 1283 (7th Cir. 1972); *United States* v. *Mitchell*, 457 F. 2d 513 (6th Cir. 1972); *United States* v. *Mohler*, 442 F. 2d 1172 (9th Cir. 1971); *United States ex rel. Cardaio* v. *Casscles*, 446 F. 2d 632 (2nd Cir. 1971); *Brown* v. *United States*, 365 F. 2d 976 (D.C. Cir. 1966). Often, the government would be unable to establish the reliability of a non-professional informant for the reason that they generally would have no prior experience with the person providing the information. Also, the identification of the informant by his true name, as opposed to an alias or the term "reliable informant" satisfies the fourth amendment policy underlying the requirement that reliability be established in the affidavit since the person aggrieved by an unlawful search based upon false information provided in the affidavit will have a viable civil remedy against the named informant which remedy is generally unavailable where the true identity of the informant is unknown.

Second, the fact that the informant here and the target of the search warrant have the same and relatively unusual last names indicates a familial relationship between the three which further enhances the credibility and reliability of the information provided by the younger Saiken. See *United States* v. *Brown*, 455 F. 2d 1201 (9th Cir. 1972); *Parker* v. *United States*, 407 F. 2d 540 (9th Cir. 1969).

Finally, reading the affidavit as a whole, it is clear from the degree of particularity with which the information is alleged, that the informant had personal knowledge of the matters stated therein. Indeed, the affidavit specifies the age and sex of the body to be seized, names not one but both owners of the property to be searched, and describes

with particular detail both the original and subsequent burial site. Such information, provided by a named informant, constitutes a sufficient basis for a valid search warrant. The contrary decision by the Court of Appeals contravenes the relevant prior decisions of this Court and undermines the preference accorded the warrant procedure. Certiorari should be granted and the holding of the Court of Appeals reversed.

CONCLUSION

For the aforementioned reasons, the petitioner respectfully requests this Court to grant the instant Petition For Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

Respectfully submitted,

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PETITIONER'S EXHIBIT A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

No. 72-2049

UNITED STATES OF AMERICA, ex rel. SAMUEL SAIKEN, *Plaintiff-Appellee,* v. PETER B. BENSINGER, Director, Department of Corrections, State of Illinois, et al., *Respondents-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. 72-C-1097 THOMAS R. MCMILLEN, *Judge.*

ARGUED SEPTEMBER 20, 1973 — DECIDED NOVEMBER 16, 1973

Before KILEY, FAIRCHILD, and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This is an appeal from an order granting a writ of habeas corpus releasing peti-

tioner Samuel Saiken from state custody. Many of the facts appear in the opinions of the district court, *Saiken* v. *Elrod*, 350 F. Supp. 1156 (N.D. Ill., 1972) and of the Supreme Court of Illinois, affirming the conviction which resulted in his being in custody. *People* v. *Saiken*, 49 Ill. 2d 504, 275 N.E. 2d 381 (1971), *cert. denied* 405 U.S. 1066.

The district court concluded that the affidavit for the search warrant was insufficient and we agree. The state has raised another claim, that the fourth amendment did not require a warrant because of the character of the place where the search was conducted. This point was not discussed by the Supreme Court nor the district court. No one has questioned the application of the exclusionary rule in the situation here, *i.e.*, to the use by one state in prosecuting an offense within its borders of evidence obtained by another state in the course of investigation of a possible offense within its borders, on an allegedly insufficient warrant.

(1) *Was the affidavit for the search warrant sufficient?*

In *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), the Supreme Court held that where an affidavit is based upon hearsay, as in the instant case, the magistrate must be informed of: (1) some of the underlying circumstances from which the informant concluded that the property sought was where the informant claimed it was, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

Turning to the first prong of the *Aguilar* test, there is no statement in the affidavit indicating the manner in which Joel Saiken, the informant, came by his information. None-

theless, the state urges that the affidavit attributes to the informant information of sufficient detail to enable the magistrate to infer that the informant gained his information by observation or other reliable means. See *Spinelli* v. *United States,* 393 U.S. 410, 416 (1969).

Deference is to be given to the magistrate's determination of probable cause. *Jones* v. *United States,* 362 U.S. 257, 270 (1960). We think that the magistrate could reasonably determine from within the four corners of the affidavit that the informant's representation was based upon more substantial information than "a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli, supra,* 416; *United States* v. *Nasse,* 432 F. 2d 1293, 1300 (7th Cir., 1970), *cert. denied* 401 U.S. 938. The informant supplied details about sex and age of the body, its location, and the description and ownership of the farm. Assuming credibility of the informant, one could readily infer that he either was present at the burial or was relating a report which he had reason to believe was based on observation.

The more difficult question is whether the second prong of *Aguilar,* with such liberalization as may be read from *United States* v. *Harris,* 403 U.S. 573 (1971), has been satisfied. Did the affidavit describe some of the underlying circumstances from which the affiant concluded that the informant was credible?

The affidavit held sufficient in *Harris* did not aver previous experience with the informant as a basis for affiant's conclusion that the informant was credible. It did contain four elements: (1) affiant's statement that on interview he had found the informant to be prudent, (2) attribution to the informant of personal and recent observations of the suspect's criminal activity, (3) corroboration of the in-

formant's report by reason of affiant's knowledge of the suspect's reputation for activity of the type reported, (4) the informant's admission against penal interest in his disclosure that he had participated in the suspect's criminal activity. Three justices joined in emphasizing the presence of the four elements, although it is not clear that they would have required all four. Another justice relied on (1), (2), and (3). Another agreed with the conclusions as to (4), but also considered the affidavit "as a whole." All five agreed on the ultimate proposition that the affidavit was sufficient. Four deemed it insufficient.

In *United States* v. *Unger*, 469 F. 2d 1283 (7th Cir., 1972), *cert. denied* 411 U.S. 920, we noted that *Harris* suggests a more flexible approach and held an affidavit sufficient. The affiant officer characterized the informant as a "citizen" who had contacted the officer, explained that the informant had occasion to be in the premises while working at his occupation, set forth in great detail the items of property observed, and stated that the citizen pointed out the building and gave the officer a diagram of the relevant area of the interior. We read some implication into the affiant's description of the informant as a "citizen" who came forward to give information, gained in the course of his employment, to the police, without appearance of spite or self-interest, and we felt that the close observation and detail described could be given weight in determining credibility.

In the instant case, as in *Unger*, the affiant did not specifically express his belief in the informant's credibility although he said he had good reasons to and did believe the facts set forth. As in *Harris* and *Unger*, this affidavit contains considerable detail, but it does not show that the infromant gained his knowledge by observation or some

other reliable way, it does not state information known to affiant and tending to corroborate the informant's report, and there is no admission against penal interest unless one assumes the unasserted fact that the informant disclosed that he had participated in the unlawful burial or concealment.

We agree with the Supreme Court of Illinois the informant's disclosure of his participation in the burial would constitute an admission against his penal interest as well as an explanation of the manner in which he obtained his knowledge. 275 N.E. 2d at 386-7. Our difficulty, however, lies in the fact that this information was not set forth in the affidavit, and the state does not contend here that any information not in the affidavit can be relied upon as having been considered by the magistrate. See *Aguilar, supra,* p. 109, footnote 1.

The affidavit does disclose the name of the informant, Joel Saiken. It also discloses that the owners of the property are Sam and Minnie Saiken. The state argues that the identity of the surnames is a basis for the conclusion that the informer would have reason to know of the burial. Perhaps relationship would be a reasonable inference if the name were not common in the particular area. It seems speculative, however, to infer knowledge from relationship. With respect to the credibility prong of *Aguilar,* the more difficult problem here, it might be reasonable to suppose that a family member in good standing would not tell the police of a hidden body on the family farm unless it was here. But identity of surname does not establish either the degree of relationship or that the individuals are on good terms.

We conclude that the district court correctly decided that the affidavit was an insufficient foundation for the warrant.

(2) *Was the search within the curtilage of petitioner's dwelling?*

The state contends that even if the search warrant is inadequate, the challenged evidence is admissible because the search and seizure complained of occurred beyond the curtilage of the petitioner's residence and accordingly does not come within the fourth amendment's proscription against unreasonable searches and seizures.

The fourth amendment protects "[the] right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In *Hester* v. *United States,* 265 U.S. 57 (1924), the Supreme Court held that this protection does not extend to "the open fields." The test traditionally used has been whether the search occurred within the curtilage. In applying this test courts have traditionally considered "the proximity or annexation [of the place searched] to the dwelling," "the inclusion [of the place searched] within the general enclosure surrounding the dwelling," and the "use and enjoyment [of the place searched] as an adjunct to the domestic economy of the family." *Care* v. *United States,* 231 F. 2d 22, 25 (10th Cir., 1956), *cert. denied* 351 U.S. 932. See *Wattenburg* v. *United States,* 388 F. 2d 853, 856-57 (9th Cir., 1968) and cases cited therein.

In *Jones* v. *United States,* 362 U.S. 257, 266-7 (1960), the Supreme Court emphasized the undesirability of importing into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle common law property distinctions. In *Katz* v. *United States,* 389 U.S. 347, 350-3 (1969), the Court declined to deal with a problem of electronic surveillance in terms of the type of area and the law of trespass, but found a constitutionally

protected entitlement to privacy of conversation within a public telephone booth. These cases caution a court to be alert, in applying the traditional curtilage test, to considerations which would make reasonable a constitutionally protected entitlement to privacy regardless of the area involved. Even so, we do not equate an individual's interest in effective concealment of evidence of crime with entitlement to privacy for the purposes of the fourth amendment. See *Wattenburg* v. *United States, supra,* 857-8; *United States* v. *Minker,* 312 F. 2d 632, 634 (3rd Cir., 1962).

Petitioner asserts that we should not consider the curtilage issue because that issue is not properly before this court. We disagree. Although neither party raised this issue in the state trial court, the judge called a witness to testify about the physical layout of the Saiken farm and held in the alternative that the search occurred within an "open field." Petitioner also offered proof on this issue. In the appeal to the Illinois Supreme Court, both parties briefed the curtilage question. The Illinois Supreme Court deemed the search warrant valid and affirmed the conviction without discussion of the curtilage issue. *People* v. *Saiken, supra.* In the federal habeas corpus proceeding, the state alleged that the body was not found within the curtilage of the farm; but for some reason, no evidence was offered on this issue by either party. On motion of the state, we granted leave to file the record of the state proceedings as an exhibit on appeal.

An analysis favorable to petitioner would be that the state had the burden, in defending against the habeas petition in federal district court, not only of pleading, but also of producing evidence that the character of the place searched was such that no warrant had been necessary.

As a result the state might be foreclosed by waiver from urging the claim in this court. Another arguably correct analysis would be that it was petitioner's burden in order to obtain habeas relief, to plead and prove facts showing that a warrant had been required as well as facts showing the warrant invalid.[1] Under the circumstances it is unsatisfactory to decide the question on the ground that the party with the burden waived. It would especially be undesirable from the point of view of judicial economy if the analysis unfavorable to the petitioner were adopted, since he would be at liberty to petition anew.

The state court record reveals testimony at least indicating that the body was found in an open area. The twenty-acre tract has often been referred to as a farm. The record is unclear as to the distances between the various structures and the location of the body, the occupancy of buildings and trailers, and other relevant matters. The crucial question is left in great doubt.

It is evident that the officers did a considerable amount of digging before finding the body. Questions of the existence of liability for damages for such interference with property are not before us. If a constitutionally protected entitlement to privacy cannot be established otherwise, we are not prepared on this record to say that digging beneath the surface of the soil establishes it.

We think the curtilage issue should be decided by the district court after the facts have had further illumination. If it be decided that a warrant was required, petitioner will be entitled to release, since it has been established that

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1. There seems to be no question but that petitioner had exhausted his state remedy in this respect as well as the claim of invalidity of the warrant.

the warrant was issued on an insufficient affidavit. The district court is at liberty to continue petitioner on bail, pending decision.

The judgment granting the writ of habeas corpus is vacated, and the cause remanded for further proceedings.

SPRECHER, *Circuit Judge,* concurring in part and dissenting in part.

I concur in the remanding of the cause for further proceedings regarding the curtilage question, but I dissent from that part of the majority opinion which holds that the affidavit was an insufficient foundation for the warrant because I believe that the opinion pushes the exclusionary rule to its ultimate "ridiculous lengths." I believe that this is the first case in which a murdered body is to be suppressed by operation of the rule.

Cardozo stated the extreme case hypothetically in *People* v. *Defore,* 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588 (1926):

> "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free."

Mr. Chief Justice Burger commented upon Cardozo's hypothetical horrible extreme while a Circuit Judge in *Killough* v. *United States,* 315 F. 2d 241, 259 (D.C. Cir. 1962) dissenting:

> "If indeed the evidence relating to the body of a homicide victim is to be excluded because of the manner of its discovery, we will have achieved the distinction of fulfilling Cardozo's phrophetic warning that, once adopted, the Suppression Doctrine might some

> day be carried to these ridiculous lengths. Cardozo did not really believe this could happen; he was indulging in a form of judicial hyperbole to make a point. It is inconceivable that judges would go to such lengths ignoring a reasonable balance between individual rights and protection of the public."

Inasmuch as the majority opinion in *Killough* did not expressly pass upon the suppression of the body as "fruit of the poisonous tree" and remanded that case for a new trial, Mr. Chief Justice Burger in his dissent in *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 413, n. 3 (1971) said that

> "What Cardozo suggested as an example of the potentially far-reaching consequences of the suppression doctrine *was almost realized in Killough. . . .*"
> (emphasis added).

It has been fully realized for apparently the first time in the portion of the majority opinion which finds that the district court correctly decided that the affidavit was an insufficient foundation for the warrant and consequently suppressed the body of a murdered girl.

This case involved a particularly brutal murder of a 17-year-old girl who "was a friend" of both a father and his son. The son, Joel Saiken, accused his father of the murder and the father, Samuel Saiken, accused the son.[1] *People* v. *Saiken,* 49 Ill. 2d 504, 275 N.E. 2d 381, 383, 384 (1971). The body was found buried on the father's farm

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1. In *Coolidge* v. *New Hampshire,* 403 U.S. 443, 445 (1971), involving the "particularly brutal murder" of a 14-year-old girl, sweepings taken from the defendant's car were suppressed but the cause was remanded for a new trial and there was substantial evidence in addition to the sweepings.

in Indiana after the son told a police officer the specific place where he had buried it after his father admitted to him that he had killed the girl.

A search warrant for the body was issued by an Indiana Justice of the Peace, based upon a police officer's affidavit, which in pertinent part recited that

> ". . . by virtue of information voluntarily conveyed to him by one JOEL SAIKEN . . . , affiant has good reasons to believe, and does believe, that a dead human body, to-wit: a white, female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:
>
> [Complete legal description of 20-acre farm]
>
> said real estate being the property of Sam D. and Minnie Saiken, said dead body being secreted in the following place and manner, to-wit: [specifying location behind goose house]."

The body was found by the police, digging at the specified location.

The father was indicted for murder and conspiracy to obstruct justice. A jury returned a verdict of not guilty on the murder charge but found him guilty of obstructing justice. He was sentenced to a term of not less than two nor more than three years. The conviction was affirmed by the Supreme Court of Illinois in *People* v. *Saiken, supra,* which concluded at 275 N.E. 2d at 386-87:

> "In the case at bar, the informant, Joel Saiken, personally saw or perceived the facts asserted. He buried the body. A number of facts are recited as to the location of the body, . . . The remaining question is whether there is a basis presented in the affidavit to suggest that the informant is honest in what he has said. The assertions of the informant—that he buried and hid a dead body—constitutes an admission of his impli-

cation in a crime, which is sufficient to lend credence to what he has said. We believe there was substantial basis for crediting the hearsay information, and that the search warrant was properly issued upon the affidavit."

However, the district court, in granting Samuel Saiken's petition for habeas corpus, said in *United States ex rel. Samuel Saiken* v. *Elrod*, 350 F. Supp. 1156, 1158 (N.D. Ill. 1972):

"It is apparent that the Justice of the Peace must have issued the search warrant because of knowledge or information which he obtained outside of the four corners of the document. Either he knew or was told or surmised that the informant was the defendant's son and therefore may have been reliable. Also he must have known or surmised that the informant was involved in a crime and was making an admission against his interest in the affidavit. Further, he must have surmised that the informant had been on the scene when the body was buried or had received this information from a reliable source, such as his father. None of this appears from the face of the warrant, however, and therefore none of it can properly be considered in determining the reasonablenes of the Justice of the Peace's determination of probable cause."

The majority opinion finds that the first prong of the *Aguilar* v. *Texas*, 378 U.S. 108 (1964) test ("the magistrate must be informed of . . . some of the underlying circumstances from which the informant concluded that the property sought was where the informant claimed it was") was met:

"The informant supplied details about sex and age of the body, its location, and the description and ownership of the farm. Assuming credibility of the informant, one could readily infer that he either was pres-

ent at the burial or was relating a report which he had reason to believe was based on observation."

But the majority finds that the second prong—"some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable"—is lacking in this case.

We must begin with the observations made in *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965):

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

Second, in *United States* v. *Unger*, 469 F. 2d 1283, 1286-87, n. 4 (7th Cir. 1972), we emphasized the inherent reliability of an eyewitness, victim or "citizen" as opposed to the ordinarily criminally-oriented government informant.

The very fact that a person named Saiken was giving specific information about property owned by two people named Saiken leads to the strong inference that the informant was either an eyewitness, victim or citizen[2] and

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2. Or a perpetrator or co-perpetrator, in which case an admission of crime carries its own indicia of credibility. *United States* v. *Harris*, 403 U.S. 573, 583 (1971).

not a professional informer inasmuch as it would be incredible that the similarity in names was a pure coincidence.

Third, the courts have had no difficulty whatever in finding an informer's reliability when he or she is a relative of the person who is the target of the search warrant. *Parker* v. *United States,* 407 F. 2d 540 (9th Cir. 1969); *United States* v. *Brown,* 455 F. 2d 1201 (9th Cir. 1972). The similarity in names in the present case gives rise to the inference that the informant was related in some way (whether son, father, brother, cousin) to the target of the search warrant. Presumably the reliability of the informer here would have been fully established if Joel had been characterized as "son" or Samuel as "father."

Finally, I would apply these principles in this case to avoid reaching the ultimate Cardozo horror of permitting a murderer or an obstructor of justice to go free because of a hyper-technical reading of the text within the four corners of a search warrant affidavit.

This case, much more so than the one in which the quotation was first used, "illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 493 (1971) (Mr. Chief Justice Burger dissenting).

I would vacate the order granting the writ of habeas corpus.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S EXHIBIT B

350 FEDERAL SUPPLEMENT

UNITED STATES of America ex rel. Samuel SAIKEN, Petitioner,

v.

Richard J. ELROD, Sheriff of Cook County, Illinois, and/or Winston E. Moore, Executive Director of Department of Corrections of Cook County, Illinois, Respondents.

No. 72 C 1097.

United States District Court,
N. D. Illinois, E. D.

Sept. 28, 1972.

On Motions to Vacate and to Stay
Oct. 17, 1972.

State prisoner petitioned for habeas corpus. The District Court, McMillen, J., held that magistrate was not afforded reasonable grounds for issuing search warrant where affidavit merely recited that affiant, by virtue of information volunteered to him by a named individual, had good reason to believe that a dead human body was buried on particular farm behind goose house, where there was nothing on the face of the warrant to show the credibility of the informant and where there was insufficient basis on the face of the warrant to ascertain that the information was reliable and not merely speculative.

Writ granted.

Motion to vacate and motion to stay denied.

1. Searches and Seizures §3.6(3)

Tests for sufficiency of affidavit for search warrant which relied upon information received from an inform-

ant were: (1) whether the magistrate had sufficient reason to believe that the informant supplied facts, not speculations, and (2) whether the affiant and magistrate had sufficient reason to believe that the informant was reliable; it was not necessary that informant's identity be disclosed. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures §3.6(3)

Magistrate was not afforded reasonable grounds for issuing search warrant where affidavit merely recited that affiant, by virtue of information volunteered to him by a named individual, had good reason to believe that a dead human body was buried on particular farm behind goose house, where there was nothing on the face of the warrant to show the credibility of the informant and where there was insufficient basis on the face of the warrant to ascertain that the information was reliable and not merely speculative. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures §3.9

Information or knowledge which magistrate may have possessed but which did not appear on the face of search warrant could not properly be considered in determining the reasonableness of the magistrate's determination of probable cause. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures §3.9

Search warrant cannot be tested by hindsight resulting from search or from trial, but must be tested by information which it presented to the magistrate before he issued it. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures §7(1)

Violation of a defendant's rights under the Fourth Amendment vitiates trial in state court. U.S.C.A. Const. Amend. 4.

6. Habeas Corpus §45.3(9)

Habeas corpus petitioner exhausted his remedies under state law by obtaining from the highest court in the state a final ruling on the validity of the search warrant which he challenged by his petition; it was not necessary that he prosecute a postconviction petition before seeking relief in federal court. 28 U.S.C.A. §2254(b).

On Motions to Vacate and to Stay

7. Searches and Seizures §3.6(1)

In affidavit for search warrant based on information supplied by informant, recital of some of the underlying circumstances is essential, but where such circumstances are detailed, reason for crediting the source of the information is given, and magistrate has found probable cause, courts should not invalidate warrant by interpreting affidavit in a hypertechnical, rather than a commonsense, manner.

Peter Georges, Chicago, Ill., for petitioner.

Edward V. Hanrahan, State's Atty., William J. Scott, Atty. Gen., Chicago, Ill., for respondents.

DECISION and ORDER

McMILLEN, District Judge.

Petitioner was convicted of conspiracy to obstruct justice and is incarcerated in the Illinois State Penitentiary. He has filed an amended petition for writ of habeas corpus on the ground that the evidence by which he was convicted was obtained by a search warrant issued in violation of his rights under the Fourth Amendment to the United States Constitution. The evidence was the body of a murdered girl buried on petitioner's farm.

The affidavit for search warrant stated as follows:

"State of Indiana

County of Porter

ss:

Before the Hon. Harry Estler, Justice of the Peace.

In the matter of a search for a dead human body believed to have been illegally procured.

Docket 25, Page 420, Cause No. 10–229.

HARRY YOUNG swears that by virtue of information voluntarily conveyed to him by one JOEL SAIKEN on Tuesday, the 18th day of February, 1969, affiant has good reasons to believe, and does believe, that a dead human body, to-wit: female approximately seventeen (17) years of age is secreted in and about the following real estate in Porter County, Indiana:

> The East ½ of the Southeast ¼ of the Southwest ¼ of Section 17, Township 37 North, Range 5 West of the Second Principal Meridian, containing about 20 acres more or less,

said real estate being the property of Sam D. and Minnie Saiken, said dead body being secreted in the following place and manner, to-wit: buried beneath the ground behind the goose house on said premises, originally buried under or near a manure pile located behind or near the goose house on said premises, said manure pile subsequent thereto having been removed.

Under and according to the provisions of Acts 1905, page 169, paragraph 61, the same being codified at Burns, Indiana Statutes 9-607 [IC 1971, 35-1-6-6], that the Honorable Judge of this Court, taking with him

such constables and police officers as he shall designate, enter, inspect and search said premises for such dead female human body as soon as may be reasonably convenient to said Court and said judge.

Further affiant sayeth not.

HARRY YOUNG
Harry Young, Affiant

Subscribed and sworn to before me, on this 19th day of February, 1969.

HARRY W. ESTLER
Justice of the Peace

My Commission expires 12-31-71."

The sufficiency of the contents of this warrant must be tested basically by the holding in Aguilar v. United States, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). In that case the Supreme Court said at p. 114, 84 S. Ct. at p.——:

> . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable."

[1] The crucial tests for the case at bar are (1) whether the magistrate had sufficient reason to believe that the informant supplied facts, not speculations, and (2) whether the officer and issuing magistrate had sufficient reason to believe that the informant was reliable. It makes no difference, under *Aguilar,* whether or not the informant's identity is disclosed, although disclosure may enforce credibility and reliability.

[2] Applying the constitutional tests to the warrant in the case at bar, it is clear that the Justice of the Peace was not afforded reasonable grounds for issuing the warrant. There is nothing on the face of the warrant to show the credibility of the informant, "one Joel Saiken", and insufficient basis on the face of the warrant to ascertain that the information contained therein is reliable and not merely speculative. There is a similarity of last names and apparent intimacy with the facts, but for all that appears in the document, its contents could be pure fantasy.

[3] It is apparent that the Justice of the Peace must have issued the search warrant because of knowledge or information which he obtained outside of the four corners of the document. Either he knew or was told or surmised that the informant was the defendant's son and therefore may have been reliable. Also he must have known or surmised that the informant was involved in a crime and was making an admission against his interest in the affidavit. Further, he must have surmised that the informant had been on the scene when the body was buried or had received this information from a reliable source, such as his father. None of this appears from the face of the warrant, however, and therefore none of it can properly be considered in determining the reasonableness of the Justice of the Peace's determination of probable cause. See Spinelli v. United States, 393 U.S. 410, 415, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The Illinois Supreme Court considered all of these extraneous facts when it held the search warrant to be constitutionally valid in People v. Saiken, 49 Ill. 2d 504, 275 N.E. 2d 381 (1971), cert. den. 405 U.S. 1066, 92 S. Ct. 1499, 31 L. Ed. 2d 796 (1972). It did not limit itself, as the magistrate must, to the matters appearing on the face of the

document. Unfortunately, and reluctantly, therefore we must respectfully differ with its decision.

We say it is unfortunate that we must disagree with the Illinois Supreme Court, because petitioner was convicted of the crime which was undoubtedly committed and that conviction has been affirmed. He was convicted partly by the fruits of the illegal warrant, however, after his motion to suppress was denied.

[4, 5] A search warrant cannot be tested by hindsight resulting from the search or from trial, but must be tested by the information which it presented to the magistrate before he issued it. Since the warrant was insufficient and merely speculative, it resulted in an unreasonable search of the petitioner's private property. A violation of his rights under the Fourth Amendment to the United States Constitution vitiates the trial in the state court. Ker v. California, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963).

[6] Petitioner has exhausted his remedies under Illinois law, as required by 28 U.S.C. § 2254(b), by obtaining a final ruling on the validity of the search warrant by the highest court in the State. He need not, therefore, prosecute a post-conviction petition before seeking relief in this court. Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469, reh. den. 345 U.S. 946, 73 S. Ct. 827, 97 L. Ed. 1370 (1953).

The petition for writ of habeas corpus is granted.

ON MOTIONS TO VACATE AND TO STAY

The court has carefully considered the defendants' motion to vacate the order of September 28, 1972 or to stay the mandate and has examined the cases cited in the defendants' motion. These cases in many instances involve

arrests without warrants, usually followed by searches. For this reason, among others, they do not control the decision in the case at bar.

The most persuasive decision cited by defendants appears to be United States v. Nasse, 432 F. 2d 1293, 1300 (7th Cir. 1970). That case is rather difficult to reconcile with the cases relied upon by the court in the case at bar, but if a choice must be made, we obviously must abide by the decisions of the United States Supreme Court. Furthermore a somewhat more adequate warrant was involved in the *Nasse* case.

[7] To summarize the requisites for a valid warrant, we can do no better than to quote from the opinion in United States v. Ventresca, 380 U.S. 102 at p. 109, 85 S. Ct. 741, at p. 746, 13 L. Ed. 2d 684:

> Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.

See also United States v. Roth, 391 F. 2d 507 (7th Cir. 1967).

The motion to vacate and the motion to stay are denied. The motion to amend the caption will be granted if and when an appearance is filed on behalf of the proper State officials.